FILE COPY

Supreme Court of the United States

October Term, 1944. No. 20.

WILLIAM F. ESENWEIN,
Petitioner,
vs.
COMMONWEALTH OF PENNSYLVANIA, Ex Rel.
MAY H. ESENWEIN.

BRIEF FOR RESPONDENT, MAY H. ESENWEIN.

J. THOMAS HOFFMAN,
JACOB SELIGSOHN,
N. J. LIPPARD,
421 Frick Bldg.,
Pittsburgh, Pa.,
Counsel for Respondent,
May H. Esenwein.

Martin & Lyle, 302 Penfield Bldg., Phila., Pa.

TABLE OF CONTENTS

	PAGE
Opinions of Courts Below	1
Jurisdiction	1
Concise Statement of the Case	2
Comment on Specifications of Errors	5
Argument	10
I. Was Petitioner deprived of any rights under Article IV, Section 1, of the Federal Constitution?	10
(a) Was the Nevada decree subject to collateral attack?	13
II. Did the Pennsylvania Courts have authority to determine the real intention of Petitioner as to the establishment of a bona fide domicile in Nevada, adversely to Petitioner, thus invalidating the Nevada jurisdiction and decree?	17
(a) How was the Court to determine intention?	20
(b) Did the Pennsylvania Supreme Court have the authority to draw its own conclusion of law, that Petitioner had no intention to establish a bona fide domicile in Nevada?	23
III. Is the decision and conclusion of law of the Pennsylvania Appellate Courts as to the lack of intention on the part of Petitioner to establish a bona fide domicile in Nevada, reviewable by this Court? Is any substantial Federal question involved?	25
IV. Is Petitioner bound by admission of his counsel made in open Court?	27
V. As to the charge of fraud	31
VI. The decision in Williams v. North Carolina, 317 U. S. 287; 63 S. Ct. 207. Did said decision in overruling Haddock v. Haddock, lay down any new rule of law prohibiting an inquiry by the	

PAGE

Courts of the matrimonial domicile, into the jurisdiction of a foreign Court (Nevada), which renders a decree in divorce? 34
VII. No substantial Federal question is involved... 40

TABLE OF CASES CITED

Andrews v. Andrews, 188 U. S. 14
5, 7, 11, 13, 15, 17, 31, 33, 35, 37

Barron, In re, 26 F. (2d), 106; 107 21
Bell v. Bell, 181 U. S. 175 .....5, 11, 13, 15, 35, 37, 39
Best v. D. of Columbia, 291 U. S. 411 29
Bowditch v. Bowditch, 314 Mass. 410; 50 N. E. (2d) 65.
6, 12, 37
Brinkerhoff-Faris Co. v. Hill, 281 U. S. 673, p. 680; 50 S. Ct. 451 23

Carey's Appeal, 75 Pa. 201, 205 19
Christy v. Atchinson, T. & S. F. Ry. Co., 214 F. 1016, p. 1023. Affirmed; 233 F. 255 28
Clark v. Wilson Lumber Co., 101 F. (2d) 709 30
Commonwealth v. McMurray, 198 Pa. 51 30
Commonwealth v. Yarnell, 313 Pa. 244, 251; 169 A. 370 .....14, 37

Dalrymple's Estate, 215 Pa. 367, 371 20
Dorrance's Estate, 309 Pa. 151, 156; 163 A. 303, 304.
5, 6, 9, 10, 14, 16, 19, 20, 21, 22, 23, 25, 26, 27, 30
Drivers' Union v. Meadowmoor, 312 U. S. 287, p. 294; 61 S. Ct. 552 25
Dulin v. Dulin, 33 Pa. Super. Ct. 4, 5 18

Esenwein v. Esenwein, 312 Pa. 77; 167 A. 350 31
Esenwein v. Esenwein, 141 Pa. Super. Ct. 604 31

France v. Jefferson Electric Co., 106 F. (2d), p. 610. 28
Fyock's Estate, 135 Pa. 522 .....14, 37

PAGE

Graham v. Dempsey, 169 Pa. 460, 462 20

Halpine v. Halpine, 52 Pa. Super. Ct. 80, 86 18
Harrison v. Harrison, 69 Pa. Super. Ct. 582 18
Hein's Estate, 22 Pa. Super. Ct. 31, 32, 33 ..... 14, 37
Holt v. Hendee, 248 Ill., 288, 296 21

Lenox Clothes Shop, Inc. v. Commissioner of Internal Revenue, 139 F. (2d) 56 30
Lyman v. Kansas City & A. R. Co., 101 U. S. 636, p. 639 29

N. Y. Evening Post Co. v. Chaloner, 265 F. 204, p. 215 .. 29
Noffsinger v. Noffsinger, 50 F. Supp. 810, 814
6, 12, 22, 28, 37

O'Donoghue v. Boies, 159 N. Y. p. 99; 53 N. E. 537 40
Oscanyon v. Arms Co., 103 U. S. 261, 263 28

Presson v. Presson, 38 Nevada, p. 203 ..... 18, 19, 33

Smith v. Standard Mfg. Co., 254 F. 427, p. 429 29
State v. Levy, 262 Mo. 181; 170 S. W. 1114 30
State v. Williams, 220 N. C. 445 34
State v. Williams, 224 N. Ca 183; 29 S. E. 2d 744 19
Streitwolf v. Streitwolf, 181 U. S. 179 35

Thompson v. Whitman, 18 Wallace, 457, 462.
5, 11, 13, 17, 37

Utley v. St. Petersburg, 292 U. S. 106 25

Walker v. Walker, 45 Nevada, p. 105 33
Williams v. North Carolina, 317 U. S. 287; 63 S. Ct. 207.
14, 22, 34, 36, 37, 38, 39
Wilson v. Eisner, 282 F. 38, 42 ..... 6, 9, 30
Young Supply Co. v. Gulf Ry. Co., 5 F. (2d), 421, p. 423 29

STATUTES CITED

PAGE

Federal Constitution, Article IV, Section 1 ..... 10, 12, 17

TEXTS CITED

PAGE

Vol. 52, Yale Law Journal, p. 353; p. 344 ..... 14, 22, 37, 38

19 Corpus Juris, 438 20

48 Dickinson Law Review, 112, Vol. X, No. 4, April, 1944 37

SUPREME COURT OF THE UNITED STATES.

October Term, 1944. No. 20.

WILLIAM F. ESENWEIN,

Petitioner,

vs.

COMMONWEALTH OF PENNSYLVANIA, EX REL. MAY H. ESENWEIN.

BRIEF FOR RESPONDENT, MAY H. ESENWEIN.

OPINIONS OF COURTS BELOW.

The Opinion of the Supreme Court of Pennsylvania is reported in 348 Pa. 455; 35 A. 2d 335 (R. 59). The Opinion of the Superior Court of Pennsylvania, which was affirmed by the Supreme Court, is reported in 153 Pa. Super. Ct. 69; 33 A. 2d 675 (R. 51).

JURISDICTION.

The jurisdiction of this Court is invoked under 28 U. S. C. A. Sec. 344(b), Judicial Code, Section 237(b), as amended.

CONCISE STATEMENT OF THE CASE.

The Petitioner and Respondent were married in Pennsylvania, November 22, 1899 and lived together until 1919. In November, 1919 Petitioner left his wife, son and daughter, and shortly thereafter brought an action in divorce alleging cruel and barbarous treatment and indignities. More than ten years later a hearing was had and a decree entered in his favor in common pleas for indignities was reversed by the Superior Court of Pennsylvania (105 Pa. Super. Ct. 261), affirmed on appeal, by the Supreme Court of Pennsylvania on March 20, 1933 (312 Pa. 77). The parties have not lived together since 1919. Petitioner later brought a second action for divorce, charging desertion. A decree entered by Common Pleas Court, Allegheny County, in Petitioner's favor was reversed on October 4, 1940 by the Superior Court of Pennsylvania, (141 Pa. Super. Ct. 604). It was not appealed from.

Eight months later, Petitioner went to Nevada, arriving in Las Vegas, Clark County, on June 23, 1941 (R. 22), and in precisely six weeks time to the day he filed a complaint (R. 11) on August 5th, 1941 against his wife, May H. Esenwein, alleging a living apart for more than three consecutive years (R. 12). After a hearing on September 8, 1941 (R. 21), a decree of divorce was awarded on the same day (R. 18-19). Petitioner testified that he came "with the intention" of making Clark County, Nevada, his "permanent place of residence" (R. 22), but left Nevada immediately after obtaining his divorce, as admitted in open Court in oral argument in the Superior Court of Pennsylvania by Petitioner's counsel, and as pointed out by Judge KENWORTHEY (R. 55) in the Opinion of the Superior Court. The Record shows in addition, and it is admitted, that "since some time in October, 1941", Petitioner has resided at "2635 North Moreland Boulevard, Cleveland, Ohio", (R. 42; R. 6-7, Par. Seventh) having remarried.

Relying upon his Nevada decree, Petitioner on February 1, 1943 filed a Petition for Revocation of an Order for the support of his wife in the County Court of Allegheny County, Pennsylvania (R. 10), alleging that Petitioner and Respondent were no longer husband and wife, since September 8, 1941, the date of the Nevada decree.

May H. Esenwein, Respondent, filed an answer (R. 27-28), denying the validity of the Nevada decree, and contended that the matters involved were Res Adjudicata, which contention was subsequently eliminated by the Superior Court and is no longer in issue. In said Answer (R. 28, Sixth Paragraph), Respondent also charged that the proceedings in Nevada resulting in the Nevada decree, "were conceived and executed in fraud both upon the States and Courts of Nevada and Pennsylvania". Petitioner asked for no more specific Answer as to the nature of the fraud. At the Hearing in the County Court (R. 30), Respondent read into the Record, from Deposition testimony of the Petitioner taken in Cleveland, Ohio, November 19, 1942 (R. 42), which disclosed the Petitioner's residence in the month following the decree, October, 1941, as Cleveland, Ohio, contradicting his Nevada testimony as to his "intention" to make Nevada his "permanent place of residence" (R. 43). Petitioner did not object to the introduction of said deposition testimony into the Record (R. 42-43). The County Court (GUNTHER, J.) heard said deposition testimony but based his Opinion in favor of Respondent on the ground of Res Adjudicata, and refused to revoke the support order. The Superior Court of Pennsylvania sustained the decision of the County Court, but on the ground of fraud, and on the ground that, in addition to the Petitioner being a resident of Cleveland, Ohio, in October, 1941, soon after the Nevada testimony of September 8, 1941 where Petitioner avowed an "intention" of residing permanently in Nevada (R. 43). Petitioner's counsel admitted in open Court during argument in the Superior Court that "we could assume he left Nevada *immediately* after obtaining his divorce" (R. 55, Opinion,

Judge KENWORTHEY). Respondent in her Brief in the Superior Court of Pennsylvania devoted an entire section covering pages 27 to 36 inclusive under the heading, "Did the Nevada Court Have Jurisdiction Either of the Parties or of the Cause of Action?" The issue of bona fide domicile, and the challenge thereto, distinctly and clearly raised by Respondent in the hearing in the County Court (See Record p. 38: bottom R. 37), (R. 42) was thus raised again in the Superior Court of Pennsylvania. The statement of Petitioner (Brief for Petitioner, p. 4) that the issue of domicile in Nevada had not been raised in the County Court, is incorrect, because Respondent's open contention in the County Court that Petitioner "came immediately after September 8, 1941, to Cleveland, Ohio" (R. 38, top) is supported by deposition testimony, (R. 42). The "Concise Statement" of Petitioner (p. 5) is incorrect, Petitioner says, that "When the case was heard on appeal in the Superior Court the judges of that court injected of their own motion the issue of acquisition of domicile over our protest that the issue had not been raised by the pleadings and had not been heard or passed upon by the trial court". The issue of domicile was raised by the charge of fraud in Respondent's Answer (R. 28, Par. Sixth); it was heard in the County Court (R. b. 37: R. 38: R. 42; R. 44; R. 45). The issue of bona fide domicile was again raised by Respondent in the Superior Court as stated, in her printed Brief and said issue was not "injected" by the Judges of that Court "of their own motion". Counsel for Petitioner admitted in open Court during argument in the Superior Court, that we could assume Petitioner left immediately after obtaining his divorce in Nevada (R. 55, Opinion Judge KENWORTHEY). From the Order of the Superior Court affirming the order of the County Court (R. 51-56), Petitioner appealed to the Supreme Court of Pennsylvania which affirmed the judgment of the Superior Court (R. 59-R. 62); dissenting Opinion (R. 63). Petitioner then presented his Petition to this Court for Writ of Certiorari at No. 668 October Term, 1943, in this Court,

which on March 6th, 1944 was denied; but subsequently, to-wit, on June 12th, 1944 was granted at No. 20 October Term, 1944. The Petitioner has paid no regular monthly arrearages for support of his wife-Respondent on the Order of December 8th, 1942 (R. 9), though formally promising to do so (R. 41), when this case is adjudicated,—which it apparently was, at least from March 6th, 1944 to June 11th, 1944. It has been formally stated, by counsel for Petitioner that Mr. Esenwein is a non-resident and therefore, not amenable to process of capias or bench warrant, (R. 41). Meanwhile Petitioner stays out of Pennsylvania, and the Order of Court of December 8th, 1942 (R. 9) still stands though not honored at any time by any monthly payments since its inception.

Comment on Specifications of Errors.

(Petitioner's Brief, pp. 6, 7).

1. That the Courts below erred in failing to give full faith and credit to the Nevada decree in divorce:—On the admission of Petitioner's counsel that Petitioner left Nevada immediately after obtaining his divorce there (R. 55, Opinion Judge KENWORTHEY), and on the admission of leaving Nevada to reside in Cleveland, Ohio, shortly after September 8th, 1941, the date of the Nevada decree (R. 6, Par. Seventh; R. 18; 19), the Pennsylvania Appellate Courts concluded as a matter of law, on said undisputed facts (Dorrance's Estate, 309 Pa. 151, p. 156; 163 At. 303, p. 304) that Petitioner had no intention to establish a bona fide domicile in Nevada (R. 55; R. 61). The Nevada decree was therefore entitled to no faith and credit in Pennsylvania:

Thompson v. Whitman, 18 Wallace, 457; 462;
Bell v. Bell, 18 U. S. 175;
Andrews v. Andrews, 188 U. S. 14;

Bowditch v. Bowditch, 314 Mass. 410; 50 N. E. 2d, 65;
Noffsinger v. Noffsinger, 50 Fed. Supp. 810; 814.

2. That the Courts below erred in disregarding Petitioner's Nevada divorce decree (on ground of lack of jurisdiction in the Nevada Court), in the absence of competent evidence attacking the Nevada jurisdiction:—The Petitioner himself recapitulates the "three facts" in evidence (Petitioner's Brief, p. 25):—

(a) Petitioner made no attempt to establish a home in Nevada but lived there only the necessary preliminary six weeks in a hotel (R. 60, note);

(b) "Petitioner left Nevada immediately after obtaining his divorce on September 8, 1941" (Petitioner's Brief, p. 25) (R. 55);

(c) "He had married and established a residence in Cleveland, Ohio, the next month, October, 1941" (Petitioner's Brief, p. 25) (R. 6; R. 42). The evidence was competent; the facts were admitted; it became a pure matter and conclusion of law for the Courts below to decide; they had authority to make the Decision:—

Wilson v. Eisner, 282 F. 38, p. 42; holding,—
"Since the facts and circumstances are *admitted the question* of whether the plaintiff was engaged in business for profit or pleasure, *became one for the Court to decide.*" (Italics ours)

Dorrance's Estate, 309 Pa. 151, p. 156; 163 At. 303, p. 304:—
"The determination of decedent's domicile in this appeal *is a conclusion of law*, based upon facts, most of which are undisputed." (Italics ours)

Test of domicile was properly applied by Courts below as enunciated in Dorrance's Estate, (supra):

"And until the Supreme Court of the United States gives us a different test of domicile, we apply our own":—

(R. 55, Opinion Superior Court of Pennsylvania.)

3. That the Supreme Court of Pennsylvania erred in reciting in its Opinion that the issue of fraud was tried in the County Court, i.e., "that the proceedings in Nevada were conceived and executed in fraud upon the states and courts of Nevada and Pennsylvania, whereas the only real issue or defense raised by the wife in the County Court was that of Res Adjudicata."

Petitioner is entirely incorrect, because:—

(a) The issue tried in the County Court,—(in addition to the question of Res Adjudicata, *now no longer an issue in this case*)—*was* clearly and distinctly the *issue of fraud*, to-wit, the proceedings on the part of the Petitioner to obtain a divorce in Nevada, without establishing a bona fide domicile there:—

"fraud . . . that is, to procure a divorce without obtaining a bona fide domicile in such other state":

Andrews v. Andrews, 188 U. S. 14.

The Record on pages 37 (Bottom), 38, shows the open argument in County Court at the Hearing on the subject of fraud, that is, failure of bona fide domicile, and the legal necessity therefor; bottom Record page 37: top of Record page 38, reading:

Mr. Seligsohn: "First, the necessary six weeks residence . . . and in addition thereto a bona fide intention to *remain*. . . . In violation of his pretended, sworn statement that he intended to *remain* there in Nevada, (he) *came immediately after September 8th, 1941, to Cleveland, Ohio.*" (R. 38, top)

This was supported in the Record by Petitioner's former Deposition testimony, exposing him residing only a few weeks after he got his Nevada decree NOT in Nevada, as he swore he intended, but in Cleveland, Ohio, where he lived,—particularly at 2635 No. Moreland Blvd.—

"A. Since some time in October, 1941." (R. 42)

How long he lived in Cleveland at some other address or addresses before that is not disclosed by the Record, though it is admitted he left Nevada immediately after September 8th, 1941, (R. 55, Opinion, Judge KENWORTHEY).

(b) That the "only" real issue or defense raised by the wife in the County Court was that of Res Adjudicata, in view of the above, is obviously misleading and incorrect. *Two* distinct and clear issues were raised by the wife-Respondent both in her Answer (R. 28) and as above pointed out (R. 37, bot.; R. 38), to-wit, Res Adjudicata and lack of Nevada jurisdiction through failure of intention to establish a bona fide domicile in Nevada (R. 42 contra R. 43). The Opinion in favor of Respondent in the County Court (on the ground of Res Adjudicata), was sustained by the Superior Court *on the ground of fraud and failure of intention* to establish a bona fide domicile in Nevada: *"He did not establish a bona fide domicile"*, (R. 55, Judge KENWORTHEY, Opinion, Superior Court). The Superior Court dismissed the issue of Res Adjudicata: it is no longer in this case and is not relevant. (See Heading Respondent's Brief herein, page 31 . . ., entitled "AS TO THE CHARGE OF FRAUD").

4. That the Supreme Court of Pennsylvania erred in its conclusion that the Superior Court was justified in inferring that proceedings in Nevada were "a sham and a fraud for the purpose of evading the support order of the County Court (R. 61)". From what has gone before it must be obvious this was the whole purpose of the Nevada

proceedings and *still continues to be*. The whole fight and litigation is an effort by the Petitioner to avoid paying the monthly support due his wife, as ordered in the Order of Court of December 8th, 1942 by the County Court of Allegheny County (R. 9); without this obvious motive, this whole litigation becomes meaningless.

As set forth clearly in our above Reply to Petitioner's 2nd Specification of Error (supra), and on the "three facts" admitted and recapitulated by Petitioner himself (p. 25, Brief for Petitioner) the Courts below, *on said admitted facts* were authorized to conclude that Petitioner never did intend to establish a bona fide domicile in Nevada —"He had no intention of making his domicile in Nevada" (R. 61, Opinion, Justice LINN),—and that said pretensions (R. 22), were a "*sham and fraud*" (R. 61), *regardless of what the motive.*

The Courts below were authorized to make the conclusion:—

> Wilson v. Eisner, 282 F. 38, p. 42;
> Dorrance's Estate, 309 Pa. 151, 156; 163 At. 303, 304.

The Petitioner has not paid a single monthly payment of $75.00 or any part of a monthly payment on said Order of Court of December 8th, 1942 (R. 9), from that day to this. Promises that "all arrearages will be promptly paid, when and as his case is adjudicated" (R. 41) have been totally disregarded. From March 6th, 1944 to June 11th, 1944 when to all knowledge of all parties, the litigation was finally "adjudicated", the Petitioner refused as he had previously refused, to honor said Order of Court by making monthly paymen s. The statement of Petitioner on page 41 (R. 41) of the Record is eloquent, that:—

> "Mr. Esenwein is a non-resident and therefore, not amenable to process of capias or bench warrant", (R. 41).

5. That the Supreme Court of Pennsylvania erred in concluding that the inferences of fact to be drawn from the contents of the entire record . . . together with the facts alleged to have been admitted in the argument before the Superior Court, clearly showed jurisdictional fact of intention to establish a bona fide domicile was lacking.

On the admitted facts that Petitioner left Nevada immediately after obtaining his Nevada divorce (R. 55) and the removal to Cleveland, Ohio, (R. 42), the Courts below did not err in their Conclusion of Law, which they were authorized to make:—

> Dorrance's Estate, 309 Pa. 151, p. 156; 163 At. 303, 304.

The admission that Petitioner left Nevada immediately (R. 55) referred to in Opinion by Justice LINN (R. 60) was not, as Petitioner says, "irrelevant", but extremely important and very material and very relevant.

6. That the Supreme Court of Pennsylvania erred in inferring that Petitioner harbored on Sept. 8, 1941, the date of his Nevada Hearing and Divorce Decree, "an intention of leaving the State of Nevada immediately afterward". The quickest reply to this is that that is *exactly* what Petitioner *admitted* that he did do, to-wit, "left Nevada immediately after obtaining his divorce decree" (R. 55, Opinion, Judge KENWORTHEY).

ARGUMENT.

1. WAS PETITIONER DEPRIVED OF ANY RIGHTS UNDER ARTICLE IV, SECTION 1, OF THE FEDERAL CONSTITUTION?

The Petitioner was deprived of no right under Article IV, Section 1, of the Federal Constitution. This provision

does not, and did not in the instant case, prevent inquiry into the jurisdiction of the Nevada Court. The Constitutional provision that full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other State, does not bar or preclude an inquiry into the jurisdiction of the Court by which a judgment or decree offered in evidence is rendered:

> "*Neither the constitutional provision* that full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other State,—(nor the Acts of Congress passed in pursuance thereof), *prevents an inquiry* into the jurisdiction of the Court by which a judgment offered in evidence was rendered." (Italics ours).
>
> THOMPSON v. WHITMAN, 18 Wallace, 457; 462, 463 (1873);
>
> BELL v. BELL, 181 U. S. 175; 21 S. Ct. 551 (1901).

The Courts of Massachusetts were,—

> "*not obliged to enforce* a decree of divorce, obtained in another State, as to persons domiciled in Massachusetts and who go into such other State with the purpose of *practising a fraud* upon the laws of the State of their domicile, that is, *to procure a divorce without obtaining a bona-fide domicile in such other State.* (Italics ours).
>
> ANDREWS v. ANDREWS, 188 U. S. 14 (1902).

> "*The full faith and credit clause* of the Constitution *does not preclude inquiry into jurisdiction* of Court in which judgment is rendered over subject matter or parties affected or into *facts necessary to give such jurisdiction, before extending* full faith and credit to such judgment. U. S. C. A. Const. Art. 4, Sec. 1. . . . *bona fide residence on part of petitioner is essential to the validity* of a decree of divorce, and *recitals* in divorce proceeding *of facts* necessary to show jurisdiction, *may be contradicted.*

"It is competent for Courts of OTHER States to inquire into the validity of a divorce so far as its validity depends upon jurisdiction of the State where the divorce was granted. . . . Domicile by one of the parties . . . is essential." (Italics and emphasis ours)

BOWDITCH v. BOWDITCH, 314 Mass. 410; 50 N. E. 2d, 65 (7-13-43).

"The divorce is *invalid* in Nevada for another reason Noffsinger went to the state solely for the purpose of obtaining a divorce. He had *no intention to reside there permanently or indefinitely.* He quit the state the 9th day of May, 1942." (The very day the divorce was granted).

NOFFSINGER v. NOFFSINGER, 50 Fed. Supp. 810; p. 814 (July 20th, 1943).

In the case at bar, likewise, the Petitioner William F. Esenwein, "left Nevada immediately after obtaining his divorce" (R. 55), precisely as happened in the said cited Noffsinger Case.

It is apparent that the right of the Petitioner, Esenwein, to claim the benefit of the full faith and credit clause (Art. IV, Section 1), for the Nevada decree in Pennsylvania, hinges directly upon whether or not—(notwithstanding said constitutional provision)—the jurisdiction of the Nevada Court could nevertheless be challenged by inquiry as to whether or not bona fide domicile in Nevada existed; and whether or not, as to the *animus manendi*, the Petitioner had a real INTENTION to remain in Nevada permanently, and to there establish a domicile.

The cases just cited give us the undoubted right to challenge the jurisdiction of the foreign Court—in this case, Nevada. As was said in the Opinion of the Superior Court of Pennsylvania (KENWORTHEY, J.):

. . . "The decree is open to collateral attack and a recital in the proceedings that such domicile existed *may be contradicted.*"

(R. 51; citing Bell v. Bell, and Andrews v. Andrews, supra.)

The precise issue, of whether or not the jurisdiction of the foreign Court may be inquired into, and whether or not such jurisdiction is subject to collateral attack, is clearly and precisely joined between the parties in this case at bar. Respondent May H. Esenwein maintains the affirmative, but the Petitioner at page 23 of his Brief says:—

> Its (Nevada Court's) action in finding as it did is NOT subject to collateral attack, in a proceeding in the Courts of ANOTHER State," (Emphasis ours).

(a) Was the Nevada decree subject to collateral attack?

> "On the whole, we think it clear that the *jurisdiction* of the Court by which a judgment is rendered in ANY STATE *may be questioned* in a *collateral* proceeding IN ANOTHER STATE, notwithstanding the provision of the fourth Article of the Constitution, and *notwithstanding the averments in the record of the judgment itself.* (Italics ours)
>
> THOMPSON v. WHITMAN, 85 U. S. 457, at page 469.

As Justice LINN writing the Opinion of the Supreme Court of Pennsylvania in the case at bar said:

> "There is no doubt of the power of the Courts below to inquire into the jurisdictional facts necessary to confer jurisdiction on the Nevada Court; Bell v. Bell, 181 U. S. 175; Streitwolf v. Streitwolf, 181 U. S. 179; Andrews v. Andrews, 188 U. S. 14", etc. . . .
>
> (R. 60; 349 Pa. 451 (1944); 35 A. 2d 335).
>
> "A bona fide domicile being a *jurisdictional fact, its existence is subject to challenge* before the Courts of

other States, notwithstanding a finding of 'residence' or 'domicile' upon the divorce record." (Italics ours)

(Prof. Lorenzon's analysis of WILLIAMS v. NORTH CAROLINA; Volume 52 Yale Law Journal, page 353).

"The right to impeach *collaterally* a decree of divorce made *in another state*, by showing *fraud* or *want of jurisdiction*, has been frequently recognized."

COMMONWEALTH v. YARNELL, 313 Pa. 244; 251.

Challenging a decree in divorce emanating from the District Court of Dawson County, State of Nebraska, the Supreme Court of Pennsylvania said:

"The court in this instance had no jurisdiction."

Fyock's Estate, 135 Pa. 522. (1890).

Challenging a decree issued by the District Court of Saline County, Nebraska, the Supreme Court of Pennsylvania said:

"The grounds of appeal are . . . whether the divorce obtained in that state (Nebraska) is valid or not (and) *cannot be inquired into." . . . "The Nebraska court was without jurisdiction, and its decree a nullity."*

HEIN'S ESTATE, 22 Pa. Super. Ct. 31; 32, 33 (1903).

If, based on the *fact* of *lack of the animus manendi*,— the lack of real, honest *intention* to establish a bona fide domicile in Nevada, we come to the conclusion of law (Dorrance's Estate, 309 Pa. 151, at page 156; 163 At. p. 304), that Nevada had no jurisdiction, then it follows as a legal conclusion that the Nevada decree "is entitled to NO FAITH AND CREDIT" in Pennsylvania. For, where, for example, the husband was NOT a bona fide resident of Pennsylvania, it was held that:

"A decree of divorce obtained in the State of Pennsylvania *in which neither party is domiciled,* upon service by publication, and in *another* state, is ENTITLED TO NO FAITH AND CREDIT IN THAT STATE." (Emphasis and italics ours).

BELL v. BELL, 181 U. S. 175; 21. S. Ct. 551 (1901);

ANDREWS v. ANDREWS, 188 U. S. 14; 23 S. Ct. 237 (1903).

In the case at bar the petitioner by his counsel openly admitted as a fact, that Petitioner Esenwein left Nevada immediately after obtaining his decree; Judge KENWORTHEY writing the Opinion of the Superior Court of Pennsylvania says (R. 55),—

"We were also told at the oral argument that we could assume he *left Nevada immediately after obtaining his divorce.*"

In addition, the testimony of Petitioner on the Nevada witness stand on Sept. 8th, 1941, pronounced under solemn oath, that he "came to Nevada . . . *with the intention* of making Clark County, Nevada" his "permanent place of residence"; and that he "retained *that intention* ever since"; and that he had it (said intention) "now" (R. 22; R. 43), is contradicted over the Petitioner's own signature *in the record* (R. 7), where Petitioner avers that "On or about October 18th, 1941, petitioner became a resident of the State of Ohio", (R. 6). The same contradiction appears from a Deposition of Petitioner admitted into the Record when Respondent in the County Court hearings (R. 30, at Record page 42) sought to show the fraud on the part of the Petitioner, alleged in the Answer of Respondent May H. Esenwein (R. 27-28; Paragraph Sixth).

From said Depositions, counsel for Respondent, without objection, read the following into the Record:

"Q. Where do you live, Mr. Esenwein?

A. 2635 North Moreland Boulevard, Cleveland, Ohio.

Q. Mr. Esenwein, how long have you lived at 2635 North Moreland?

A. Since some time in October, 1941." (R. 42)

(See Record, page 42; at Record page 43 appears the verbatim testimony of Petitioner, September 8th, 1941, in Nevada, as to his "intention" to establish a bona fide domicile, a permanent place of residence in Nevada.)

The reason given in the County Court hearing below by counsel for respondent, for placing contradictory testimony of Petitioner in the Record, was to expose the lack of bona fide intention as to the establishment of a domicile in Nevada by Petitioner:—

> We said: "That is for the purpose of a comparison of the testimony in the records". (R. 43).

The record shows that Petitioner had already ensconced himself in his Cleveland home "Some time in October, 1941" (R. 42), i.e. "on or about October 18, 1941"; that he left Nevada immediately after obtaining his divorce (R. 55). Judging Petitioner by his ACTS and conduct as against his mere words, even though under oath, (Dorrance's Estate, 309 Pa. 151, page 156; 163 At. page 304); he did NOT have the animus manendi—the *intention* of remaining; he did NOT intend to establish a bona fide domicile in Nevada. This being the case, *can the Petitioner escape the lack of Nevada jurisdiction by hiding behind the full faith and credit clause?* Can he be permitted to protest against the exposure of his own fraud and mala fides (R. 28, Par. Sixth; R. 22 & R. 6, Par. Seventh; R. 42 & R. 43; R. 55, "left Nevada immediately", etc.)—and at the same time demand that the Nevada decree be honored in Pennsylvania under the full faith and credit clause of the Federal Constitution?

The answer is clearly given in the negative;—the lack of the Nevada jurisdiction will be inquired into, and may

be exposed notwithstanding the full faith and credit clause which will not serve Petitioner as a shield.

THOMPSON v. WHITMAN, 85 U. S., 457 at p. 469.

The insistence of Petitioner in claiming that he has been deprived of "rights and privileges guaranteed him by Art. IV, Sec. 1, of the Federal Constitution", is simply another way of insisting on his, Petitioner's, position, that the Constitutional provision, in and of itself, and without discussion, *bars inquiry* into the question of the jurisdiction of the Nevada Court. The use by Petitioner of the word "guaranteed" lends no strength whatever to his claim.

Article IV, Section 1, supra, was not intended as a refuge for those who practice *mala fides* and fraud upon the laws of the State of their domicile,—(here Pennsylvania). Where a libellant went to a foreign state for the purpose of practising a fraud upon the laws of Massachusetts, the State of his domicile, i.e., to obtain a divorce in the foreign jurisdiction without obtaining a bona fide domicile there, Massachusetts refused to recognize such foreign decree; Andrews v. Andrews, 188 U. S. 14 (1902).

Petitioner established no bona fide domicile in Nevada; he never intended to do so; the result was that the Nevada Court therefore had no jurisdiction. Therefore, the "full faith and credit" clause has no relevancy to the situation, and Petitioner has not been deprived of any rights under Article IV, Section 1, of the Federal Constitution.

II. DID THE PENNSYLVANIA COURTS HAVE AUTHORITY TO DETERMINE THE REAL INTENTION OF PETITIONER AS TO THE ESTABLISHMENT OF A BONA FIDE DOMICILE IN NEVADA ADVERSELY TO PETITIONER, THUS INVALIDATING THE NEVADA JURISDICTION AND DECREE?

At the argument of this case in the Superior Court of Pennsylvania the Petitioner openly took the position that

he had a right to go to Nevada, stay there just long enough to get his decree and to leave at once thereafter, in spite of his, Petitioner's testimony in the Record, given in Nevada, (R. 22; R. 42-43), that he *intended* to remain in Clark County, Nevada, as his "permanent place of residence".

The position of Petitioner is still the same, and is reiterated in his Brief, at page 26, as follows:—

> "In the second place, the *promptness of petitioner's removal from Nevada* is also a WHOLLY IMMATERIAL circumstance so far as furnishing any support for an attack upon the Nevada court's finding in favor of domicil". (Emphasis and italics ours).

In other words, the Petitioner reiterates and stands upon his admission made in open Court, to President Judge KELLER, in oral argument in the Superior Court of Pennsylvania, that we could take it for granted and without further proof or discussion, that Petitioner left the State of Nevada immediately after he obtained his divorce: "We were told at the oral argument that we could assume he left Nevada immediately after obtaining his divorce", (R. 55). Petitioner not only reiterates the "*promptness* of petitioner's removal from Nevada" *after* obtaining his decree but Petitioner goes further and asks, "What of it"? Petitioner considers it entirely of no moment, no importance whatever. The contradiction between swearing on the witness stand in Nevada, on Sept. 8th, 1941 that he intended to make Nevada his "permanent place of residence", and then in the face of such testimony, leaving "immediately", and with "promptness", after the granting of the decree, and admitting it in open Court (R. 55), is nothing to the Petitioner, it is "wholly immaterial", he says; (Petitioner's Brief, page 26). And this, in spite of the fact that *without the animus manendi*, the Nevada Court, *as a matter of law*, had *no jurisdiction*.

> Dulin v. Dulin, 33 Pa. Super. Ct. 4, 5 (1907);
> Halpine v. Halpine, 52 Pa. Super. Ct. 80, p. 86;
> Harrison v. Harrison, 69 Pa. Super. Ct., p. 582;
> Presson v. Presson, 38 Nevada Sup. Ct., p. 203;

State v. Williams et al., 224 N. C. 183; 29 S. E. 2d, 744.

The petitioner in effect, admits that the *animus manendi* was lacking, that he had no intention whatever of making Nevada his "permanent place of residence" (R. 42-R. 43). To all intents and purpose the Petitioner admits all this when he states, as he DOES (supra) that the immediate and prompt removal of Petitioner from Nevada after he got his decree is "wholly immaterial"; there is no other interpretation of Petitioner's bold gamble. To all intents and purposes the Petitioner is admitting that the Nevada Court had no jurisdiction, because, as a matter of FACT, he entertained no animus manendi; he virtually admits it, (R. 55).

Counsel for Petitioner in Nevada knew that it was necessary to establish on the Nevada record, not merely that Petitioner resided the preliminary six (6) weeks—(42 days)—in Nevada before filing his libel in divorce there, but that Petitioner also had the INTENTION, *presently existing as an actual fact in the mind* of the Petitioner, of establishing a bona fide domicile, a permanent place of residence in Nevada, i.e., the *animus manendi*. Otherwise, as a matter of law the Nevada Court would have no jurisdiction; "*to the factum of residence must be added the animus manendi*"—Presson v. Presson, 38 Nevada, p. 203.

"Two things must concur to constitute domicile—first, residence; secondly, the *intention* of making the place of residence the *home* of the party. There must be both *fact* and *intent*". (Italics ours)

CAREY'S APPEAL, 75 Pa. 201, p. 205.

"To acquire a domicile of choice two things must concur: (1) Physical presence in the place where domicile is alleged to have been acquired; (2) *Intent* to make that place the home of the party". (Italics ours)

DORRANCE'S ESTATE, 309 Pa. 151, p. 173; 163 Atl. 303.

(a) How was the Court to determine intention?

Was the real intention of the Petitioner to be determined merely by his words on the Nevada witness stand, or by his previous and subsequent conduct?

Here we arrive at the crux of this case.

The testimony in question of the petitioner in Nevada was:

> "Q. When you came to Nevada you came with the intention of making Clark County, Nevada, your permanent place of residence?
>
> A. Yes, sir.
>
> Q. Have you retained that intention ever since?
>
> A. Yes, sir.
>
> Q. And you have it now?
>
> A. Yes, sir".

The three vital questions are leading questions; the answers, perfunctory. The rule of law is to judge the intention of a person by his acts and conduct, and not merely by his words.

The case of DORRANCE'S ESTATE, 309 Pa. 151; 163 At. 303, is rich in its wealth of citations of authorities of acts versus words in determining domicile.

At page 170 (Dorrance's Estate, 309 Pa.) we read:—

> "More weight will be given to a person's acts than to his declarations, and when they are inconsistent the acts will control".
>
> 19 Corpus Juris, 438.
>
> "They—(words, recitals in deeds, wills, etc.)—are not controlling when contradicted by other facts and circumstances".
>
> Dalrymple's Estate, 215 Pa. 367, 371, quoting *Jacobs on Domicile*.
>
> "That acts speak louder than words is sound law as well as proverbial wisdom".
>
> Graham v. Dempsey, 169 Pa. 460, 462.

"On the question of domicile, less weight will be given to a party's declarations than to his acts".

Holt v. Hendee, 248 Ill. 288, 296.

"While residence in this case (naturalization) depends largely on intention, the intention is to be gathered from the acts of the petitioner rather than from his declarations".

In re Barron, 26 F. 2d, 106, 107.

"In Lord HALSBURY'S 'The Laws of England', volume VI, page 186, under the general topic of Domicile, it is stated . . . at page 187 . . . 'Expressions of intention written or oral, may be given in evidence, but such evidence . . . *cannot prevail against a course of conduct leading to an opposite inference*' ". (Italics ours)

Dorrance's Estate, 309 Pa., p. 168.

"With a few scattered expressions to the contrary the *law is generally settled* that, as regards the *determination of domicile*, a person's expression of desire may not supersede the effect of his *conduct*". (Italics ours)

Dorrance's Estate, 309 Pa. 151, p. 165.

At page 156 (Dorrance's Estate, 309 Pa. 151) we read:—

"The determination of decedent's domicile in this appeal *is a conclusion of law*, based upon *facts*, most of which are undisputed." (Italics ours)

Likewise, in the case at bar, the immediate removal of Petitioner from Nevada after obtaining his divorce, is not disputed; (R. 55; Brief for Petitioner, page 26). Petitioner's residence in Cleveland, Ohio, since October 18th, 1941 (R. 6, Par. Seventh) is undisputed.

These are facts, and the determination of Petitioner's domicile and whether or not maintained in Nevada, is a *conclusion of law*, on said facts. Further, "where a finding of fact is simply a deduction from other facts . . . and the

ultimate fact in question is purely the result of reasoning, *we are competent to judge of its correctness* and will draw our own conclusions from the facts as reported"; Dorrance's Estate, supra. (Italics ours). The intention *must* be determined by a person's acts, rather than by his words, because there is no other way to arrive at a determination. The rule in Dorrance's Estate, supra, is realistic, and saves us from being victimized by any pattern of legal, formal ritualism. (R. 22; R. 43), where subsequent conduct belies the sincerity of words spoken even under oath. (R. 22) (R. 42).

> "The divorce is invaiid in Nevada for another reason. Noffsinger went to the state solely for the purpose of obtaining a divorce. *He had no intention* to reside permanently or indefinitely there. *He quit the state the 9th day of May, 1942*". (The very day the divorce was granted). (Italics ours)
>
> Noffsinger v. Noffsinger, 50 Fed. Supp. 810, page 814 (July 20, 1943).

Intention must be determined by a person's acts.

> "If it appears from the *facts* that the *petitioner left the state shortly after the decree of divorce was granted*, a presumption might well be created that *no bona fide intention to establish a permanent home existed*" . . . "In this event the decree could be regarded by the Courts of *other* states as *invalid*". (Italics ours)
>
> (Prof. Lorenzon, on Williams v. North Carolina; Haddock v. Haddock) Vol. 52 Yale Law Journal, p. 353.

(b) Did the Pennsylvania Supreme Court have the authority to draw its own conclusion of law that Petitioner had no intention to establish a bona fide domicile in Nevada?

"The determination of decedent's domicile in this appeal is a conclusion of law, based upon facts, most of which are undisputed".

Dorrance's Estate, Supra.

"Where a finding of fact is simply a deduction from other facts . . . and the ultimate fact in question is purely the result of reasoning, we are competent to judge of its correctness and will draw our own conclusions from the facts as reported".

Dorrance's Estate, Supra.

The State of Pennsylvania has established its own test of domicile in Dorrance's Estate, 309 Pa. 151; 163 At. 303; and has lawfully applied its own rule as enunciated in Dorrance's Estate, supra.

"And until the Supreme Court of the United States gives us a different test of domicil, we apply our own. See Restatement, Conflict of Laws, Sec. 10": (From Opinion of Superior Court of Pennsylvania, R. 55; 153 Pa. Super. Ct. 69; 33 At. 2d 675.

The State of Pennsylvania has the

"supreme power to interpret and declare the written and unwritten laws of the State".

Brinkerhoff-Faris Co. v. Hill, 281 U. S. 673, p. 680; 50 S. Ct. 451.

Petitioner in his Brief (page 23) says:—

"Without quarreling with the use of the word 'immediately', because *the record shows that petitioner*

> *had left Nevada* and was living in Cleveland within the comparatively short time of six or seven weeks, we contend that that *fact* does not *require* the inference that he intended to leave at the time he testified on September 8, 1941". (Italics ours)

But the further fact appears (R. 55) that Petitioner left Nevada "immediately after obtaining his divorce"; (Opinion Superior Court of Pennsylvania). The decision of the ultimate fact, the real intention of the Petitioner, was within the province of the Pennsylvania Appellate Court, which was competent to draw its own conclusion of law.

Petitioner complains that the facts before the Pennsylvania Appellate Courts did not "require" the inference that Petitioner had no real intention to establish a bona fide domicile in Nevada. Whether or not the decision and conclusion of law arrived at by the Superior Court of Pennsylvania, affirmed by the Supreme Court of Pennsylvania, was "required" under the facts before said Court, was entirely for said Court to decide. This presents no substantial Federal or Constitutional question, and affords Petitioner no ground of complaint.

Petitioner complains in his 6th Specification of Error, (p. 8, Brief for Petitioner) that:—

> "The Supreme Court of Pennsylvania erred in inferring that petitioner harbored on the date of the trial of his case in Nevada, which was also the date of his decree, an *intention* of leaving the State of Nevada *immediately* afterward." (Italics ours)

But he *did* leave immediately after obtaining his decree as admitted in open Court, (R. 55). This, plus his admitted residence in Cleveland, Ohio, beginning "about October 18, 1941," (R. 6, Par. Seventh), furnished the facts upon which the Superior Court of Pennsylvania, affirmed by the Supreme Court of Pennsylvania, based its conclusion, that there was no intention to establish a bona fide domicile in Nevada.

III. IS THE DECISION AND CONCLUSION OF LAW OF THE PENNSYLVANIA APPELLATE COURTS AS TO THE LACK OF INTENTION ON THE PART OF PETITIONER TO ESTABLISH A BONA FIDE DOMICILE IN NEVADA, REVIEWABLE BY THIS COURT? IS ANY SUBSTANTIAL FEDERAL QUESTION INVOLVED?

The Pennsylvania Appellate Courts have found as a fact on the record testimony (R. 22; R. 42-43; R. 6, Par. Seventh), and upon the admission made in open Court, (R. 55, —"he left Nevada immediately . . .") that Petitioner did not intend to, nor did he establish a bona fide domicile in Nevada. (R. 55,—"he did not establish a bona fide domicil") and (R. 61,—"he had no intention of making his domicile in Nevada".)

This finding of fact and conclusion of law thereon was exclusively for the Pennsylvania Courts, (Dorrance's Estate, supra); and no substantial Federal question is involved.

". . . its interpretation was in the Illinois Courts and not here".

Drivers Union v. Meadowmoor Co., 312 U. S. 287, p. 294; 61 S. Ct. 552.

"An appeal from a state court must be dismissed for want of jurisdiction if no substantial Federal question is presented and the judgment rests upon an independent basis of state law adequate to support it".

Utley et al. v. St. Petersburg, 292 U. S. 106.

The test of domicile as enunciated in Dorrance's Estate, 309 Pa. 151, p. 156; 163 At. 303,—that intention to establish a bona fide domicile will be determined by one's acts and conduct rather than by one's words,—is the independent basis of the rule of law laid down in that case.

"And until the Supreme Court of the United States gives us a different test of domicile, we apply our

own", (R. 55, Opinion, in this case, Superior Court of Pennsylvania, 153 Pa. Super. Ct. 69; 33 At. 2d 675).

"The determination of decedent's domicile in this appeal is a conclusion of law, based upon facts, most of which are undisputed. . . . Where a finding of fact is simply a deduction from other facts . . . and the ultimate fact in question is purely the result of reasoning, we are competent to judge of its correctness and will draw our own conclusions from the facts reported".

Dorrance's Estate, Supra.

Petitioner argues (Brief, p. 25), that Pennsylvania Appellate Courts denied the Nevada jurisdiction "without evidence". He then proceeds paradoxically, to enumerate the items of evidence, and enumerates *three facts*, including the following:—

(1) That Petitioner left Nevada immediately after obtaining his divorce on September 8, 1941; and,

(2) That Petitioner had established a residence in Cleveland, Ohio in the latter part of October, 1941; (October 18, 1941; R. 6).

Petitioner disposes of and waives aside this evidence by arguing:—

(1) That "the promptness of Petitioner's removal from Nevada is "*wholly immaterial*"; and,

(2) "The fact that Petitioner had established a residence in Cleveland in October, 1941" being considered as relevant to Petitioner's actual intention, on the issue of Nevada Domicile, is "more than we can understand". (Brief, p. 26)

The facts of evidence, being undisputed, competent and material,—(the *animus manendi* being obviously lacking),

—the finding of facts and conclusion of law was for the Pennsylvania Appellate Courts, solely; Dorrance's Estate Supra, and no substantial Federal question is involved.

IV. IS PETITIONER BOUND BY ADMISSION OF HIS COUNSEL MADE IN OPEN COURT?

The issue involved in this case is the validity of the Nevada divorce decree in Pennsylvania. The Nevada decree is attacked upon the ground of fraud (R. 28, Par. Sixth; R. 42-43),—the lack of intention on part of the Petitioner to make Nevada his "permanent place of residence", that is, to establish a bona fide domicile in Nevada. In addition to the preliminary six weeks residence in Nevada, it was vitally necessary that the *animus manendi* exist, i.e., the honest intention to establish a bona fide domicile in Nevada. The whole matter of the Pennsylvania decision as to the Nevada jurisdiction, turned on whether or not this intention *did or did not exist in the mind of the Petitioner* as he testified in Nevada, on September 8th, 1941 (R. 22).

At the argument of this case in the Superior Court of Pennsylvania, President Judge KELLER very pointedly inquired of Petitioner's counsel as to the exact time that Petitioner left Nevada after September 8th, 1941, when he was awarded his decree; and the reply, as cited in the Opinion of said Court by Judge KENWORTHEY (R. 55) was, "that we could assume he left Nevada *immediately* after obtaining his divorce". Petitioner, in his Brief (page 25), among the "three facts" he mentions and discusses, *includes* the fact "(2) that petitioner left Nevada immediately after obtaining his divorce on September 8, 1941". Petitioner refers to it, quotes it, discusses it, and *does not deny it.*

The test of domicile applied was the principle enunciated in Dorrance's Estate, Supra, that Petitioner's true INTENTION is to be determined by his ACTS and CON-

DUCT,—not by his mere words. The act of the Petitioner in leaving Nevada immediately after obtaining his divorce there, as admitted in open Court, in addition to his unquestioned residence in Cleveland, Ohio, (R. 6, Par. 7; R. 42) only a few weeks after his testimony in Nevada (R. 43), exposed the lack of any intention on the part of Petitioner to establish a bona fide residence in Nevada. The Appellate Courts of Pennsylvania so found: Judge KENWORTHEY (R. 55) and Justice LINN (R. 61).

The case at bar is like the case of Noffsinger v. Noffsinger, 50 Fed. Supp. 810, p. 814 (July 20th, 1943) in that in both cases the libellant left the State of Nevada immediately after obtaining his decree.

The admission made by Petitioner's counsel in open Court bore directly upon the precise issue in the case, to-wit, Nevada jurisdiction which depended for its breath of life upon whether or not Petitioner had the intention to establish a bona fide domicile in Nevada.

Was the Petitioner bound by this admission of his Counsel made in open Court, (R. 55)?

The affirmative was held in the leading case of Oscanyon v. Arms Co. (1880), 103 U. S. 261; 263, as follows:—

> "The power of the Court to act in the disposition of a trial upon facts conceded by counsel, is as plain as its power to act upon the evidence produced. In the trial of a cause the admissions of counsel, as to matters to be proved, are constantly received and acted upon. . . . Indeed, *any facts, bearing upon the issues involved, admitted by counsel, may be the ground of the Court's procedure* equally as if established by the clearest proof." (Italics ours)

To the same effect is the case of:—

> Christy v. Atchinson T. and S. F. Ry. Co. (District Court, Colorado, 1914) 214 F. 1016 (page 1023) affirmed at 233 F. 255, (page 253);
> also, France v. Jefferson Electric Co. (C.C.A. 6th

Cir., 1939) 106 F. (2d), p. 610;
Smith v. Standard Manufacturing Co. (C.C.A. 2d Cir., 1918) 254 F. 427; p. 429.

The same principle is announced in the case of:
Best v. D. of Columbia, 291 U. S. 411 (1934),
in which case Chief Justice Hughes at page 415 said:—

"The power of the Court to act upon facts conceded by counsel is as plain as its power to act upon evidence produced."

Where the admission is contained in a *brief*, it was held in

Young Supply Co. v. Gulf Ry. Co. (C.C.A. 5th Cir., 1925) 5 F. 2d, 421, p. 423:—

"We may consider the statements in the brief as *admission of fact*." (Italics ours)

Where the admission of counsel is made in *argument* in open Court—(as in the case at bar)—in the case of:
N. Y. Evening Post Co. v. Chaloner (C.C.A. 2d Cir., 1920) 265 F. 204, p. 215, it was held:

"A court has a right to accept the admission of counsel *made upon argument* or trial of a cause, and may act upon it as circumstances require."

A case where the *admissions of counsel* were *made during argument* and form the Court's *basis* for a motion to dismiss entertainment of a Bill in Equity, is the case of:
Lyman v. Kansas City and A. R. Co., 101 U. S. 636, p. 639:—

"Such statement made in open Court, *binds the party* as much so as if specifically pleaded".

Illustrating and supporting the same principle of admissions by counsel as binding, "short of a compromise of a

client's claim or a confession of judgment", are the following cases:

Lenox Clothes Shop, Inc. v. Commissioner of Internal Revenue, 139 F. (2d) 56;

Clark v. Wilson Lumber Co. (C.C.A. 9th Cir., 1935) 101 F. (2d), 709.

These cases hold that: "*The admission is binding on defendant.*". And to the same effect and supporting the same principle are:—

State v. Levy, 262 Mo. 181; 170 S. W. 1114 (1914);

Comm. v. McMurray, 198 Pa. 51 (1901).

The fact that Petitioner in the case at bar left Nevada immediately after obtaining his divorce (R. 55) being admitted, the question of its legal effect, i.e., failure of intention to establish a bona fide domicile in Nevada, was a question for the Court.

In Wilson v. Eisner, (C.C.A. 2d Cir., 1922) 282 F. 38, p. 42, the Court said:—

"Since the facts and circumstances are *admitted*, the question of whether the plaintiff was engaged in business for profit or pleasure, became one *for the Court to decide.*"

Supporting the same principle, i.e., where the facts are admitted, the conclusion is one of law for the Court, is the case of:—

Dorrance's Estate, Supra:

"The determination of decedent's domicile in this appeal is a conclusion of law, based upon facts, most of which are undisputed."

"We must also take into consideration the *facts* formally admitted at the argument before the Superior Court": (R. 60, from Opinion of Justice LINN, Supreme Court of Pennsylvania).

We submit no Federal question is involved.

V. AS TO THE CHARGE OF FRAUD.

Respondent in the County Court charged that Petitioner's divorce proceedings in Nevada were conceived and executed in fraud. As stated in the history of this case (supra), the Petitioner had failed in two separate efforts to obtain a divorce in Pennsylvania from the Respondent, May H. Esenwein; Esenwein v. Esenwein, 312 Pa. 77; and Esenwein v. Esenwein, 141 Pa. Super. Ct. 604. The adjudication against Petitioner at 141 Pa. Super. Ct. 604, was dated October 4th, 1940. Eight months later, to-wit, on June 23rd, 1941 (R. 22), he first "became a resident of Las Vegas, Clark County, Nevada", for the purpose of there instituting another action against Respondent in divorce. Nevada law required a preliminary six weeks residence; and precisely six weeks to the day, to-wit, on August 5th, 1941 (R. 11), Petitioner filed his "Complaint" in divorce in Nevada.

Petitioner, in his Brief (page 17) says:—

> ". . . The issue of acquisition of domicil was not raised in the County Court".

Petitioner in his said Brief also says (page 7, Par. 3rd):—

> "The *only real* issue or defence raised by the wife in the County Court was that of res adjudicata." (Italics ours)

Both statements are incorrect. The Answer of the Respondent (R. 28, Par. Sixth), to Petitioner's Petition for Revocation of the Support Order in the County Court, charged fraud,—"that the proceedings in Nevada . . . were conceived and executed in fraud both upon the States and Courts of Nevada and Pennsylvania". (See Andrews v. Andrews, 188 U. S. 14 (1902), ". . . practising a fraud upon the laws of the State of their domicile, that is, to procure

a divorce without obtaining a bona fide domicile in such other state.")

The testimony read into the record in the County Court (R. 42), contradicted that appearing in the Nevada exemplification (R. 22) (R. 43), and exposed the fraud. The admission by Petitioner's counsel in open Court (R. 55), that Petitioner left Nevada immediately after obtaining his divorce, further supported said charge.

Petitioner in his Brief (page 47) says:—

> "That court, however, undertook to pass upon the questions of jurisdiction and domicil. These questions were raised *by the court itself.*" (Italics ours)

This statement is incorrect: (R. 28, Par. Sixth; R. 42).

The Brief of Respondent in the Superior Court of Pennsylvania contained an entire section (VII), entitled, "DID THE NEVADA COURT HAVE JURISDICTION EITHER OF THE PARTIES OR OF THE CAUSE OF ACTION?", covering nine pages, beginning at page 27 in said Brief. This dealt with the charge of fraud, failure of the animus manendi, to-wit, the obtaining of a divorce in Nevada without the intention to establish a bona fide domicile in Nevada. This was especially called to the attention of Petitioner's counsel by Judge KENWORTHEY from the Bench, during the oral argument in the Superior Court.

The burden of Petitioner's argument in his Brief (p. 22), *which argument raises no Federal question*,—is that had Petitioner been aware that the Nevada jurisdiction was being challenged, he "could have shown 'the conditions' which developed immediately afterward." To this Respondent replies:

(1) Petitioner was perfectly well aware that the Nevada jurisdiction was being challenged in the County Court, (R. 28, Par. Sixth; R. 42 versus R. 43).

The Nevada jurisdiction was a subject of open argument and discussion during the Hearing in the County Court (R.

30). At the bottom of page 37 in the Record (R. 37) appears the following:

> "Mr. Watts: I wish to ask if counsel for the prosecutrix considers that the divorce granted by the Nevada court was legal and valid in the State of Nevada?
>
> "Mr. Seligsohn: That pretended divorce which is in the Exemplification which you have exhibited to this court today, Mr. Watts, and the Decree in that divorce is, in my opinion, absolutely invalid in Nevada for the reason that the Court in Nevada did not, at any time, have *jurisdiction* of the parties or of the subject matter, because the law of Nevada requires two things: First, the necessary six weeks residence in the County where the complaint is brought, before the complaint is brought, and in addition thereto *a bona fide intention* to remain in that County . . . (and where) it has been proved by events that the petitioner in that case, *in violation of his pretended, sworn statement, that he intended to remain there in Nevada, came immediately after September 8, 1941 to Cleveland, Ohio*".

This was supported, and the Answer of Respondent charging *fraud* (R. 28, Par. Sixth) was supported by the deposition read into the Record by Respondent (R. 42), thus:—

> "Q. Where do you live, Mr. Esenwein?
>
> A. 2635 North Moreland Boulevard, Cleveland, Ohio.
>
> Q. Mr. Esenwein, how long have you lived at 2635 North Moreland?
>
> A. Since some time in October, 1941". (R. 42)

In regard to jurisdiction and domicile, counsel for Respondent (R. 44 and 45) called the County Court's attention to the cases of Presson v. Presson, 38 Nev. p. 203; Walker v. Walker, 45 Nev. p. 105, relating to the necessity for the animus manendi; and to Andrews v. Andrews, 188 U. S. 14, "relating to residence and jurisdiction" (R. 45).

Petitioner's contention that he was not aware in County Court that jurisdiction was being challenged is contradicted by the Record itself as above pointed out.

VI. THE DECISION IN WILLIAMS v. NORTH CAROLINA, 317 U. S. 287; 63 S. Ct. 207. DID SAID DECISION IN OVERRULING HADDOCK v. HADDOCK, LAY DOWN ANY NEW RULE OF LAW PROHIBITING AN INQUIRY BY THE COURTS OF THE MATRIMONIAL DOMICILE, INTO THE JURISDICTION OF A FOREIGN COURT (NEVADA), WHICH RENDERS A DECREE IN DIVORCE?

The facts: O. B. Williams and Lillie Shaver Hendrix left their respective spouses in the matrimonial domicile of all the parties, to-wit, North Carolina, in May, 1940, and went to Nevada, where on the same day, June 26th, 1940 (exactly six weeks after arrival), each of them filed libels in divorce against their respective spouses back home in the matrimonial domicile. O. B. Williams got his Nevada decree issued on August 26, 1940. Lillie Shaver Hendrix got her decree on October 4th, 1940; and on that same day said two libellants married together, and *immediately returned* to Pineola, N. C. where they lived as husband and wife, and were there indicted for bigamous cohabitation. Defendants were tried and convicted and were given prison sentences. Defendants appealed; the Supreme Court of N. C. upheld the convictions State v. Williams, (220 N. C. 445). Petition for Certiorari to the Supreme Court of the United States allowed; case argued; Opinion at 317 U. S. 287; 63, S. Ct. 207. Under the Rule in the Haddock Case still then in force, the substituted service upon the Respondent spouses who did not submit to the Nevada jurisdiction, nor appear, would make such service invalid in North Carolina, and as far as Respondent spouses were concerned.

North Carolina relied upon Haddock v. Haddock, as to

the matter of bona fide domicile of the defendant-libellants, it appears that this was admitted by North Carolina and therefore not passed upon by this Court. However on account of confusion of issues before the North Carolina jury,—(pointed out by Judge KENWORTHEY, R. 52),—this Court after argument on October 20th, 1942, decided on December 21, 1942,—"The judgment is reversed and the cause is remanded to the Supreme Court of North Carolina for further proceedings not inconsistent with this opinion". On February 24th, 1943 the Supreme Court of North Carolina accordingly vacated its judgment and a new trial was ordered; (24 S. E. 2d, p. 256). At this second trial the clear issue of defendant's bona fide domicile and intention to establish same in Nevada, was placed before the jury. Defendants were again convicted of bigamous cohabitation. It appears that defendants had left Nevada immediately after Lillie Shaver Hendrix had obtained her decree in divorce on October 4th, 1940. The second conviction on the clear issue of domicile in Nevada, shows lack of intention on part of defendants to establish any bona fide domicile in Nevada. Defendants appealed to Supreme Court of North Carolina again, which on April 12th, 1944 affirmed the convictions (224 N. C. 183; 29 S. E. 2d 744). Defendants petitioned this Court for writ of Certiorari which was allowed.

Petitioner argued in the Superior Court of Pennsylvania, that since the Williams et al v. N. C. decision, there is a "new rule of law" (p. 7, top, Appellant's Original Brief in Superior Court). His position is still the same. Petitioner at page 26 of his Brief for Petitioner speaks of an alleged "aversion *to the new rule of law*", supposedly, and according to Petitioner, entertained by the "Pennsylvania appellate courts". According to Petitioner this alleged and supposed "new rule of law", has "definitely shattered" Bell v. Bell, 181 U. S. 175, Streitwolf v. Streit-

wolf, 181 U. S. 179 and Andrews v. Andrews, 188 U. S. 14, "as present day authorities"; (Page 7 of Petitioner's Petition for Writ of Certiorari in this case).

There is absolutely no reasoning or argument for this proposition whatever.

The entire case of Petitioner rests upon his theory that the case of Williams v. N. C. lays down a "new rule of law" which *prohibits inquiry* into the bona fides of Domicile of any libellant, (that is, inquiry as to jurisdiction), in a case where the libellant has sought a foreign forum within which to bring his action in divorce, even though the libellant openly admits that he went from the matrimonial domicile (Pennsylvania), to the foreign State (Nevada), purposely to obtain a divorce, and, in fact, left that State (Nevada) *immediately* after obtaining his decree.

The position of Petitioner is (Brief for Petitioner, p. 23), that the Nevada decree is not subject to attack in Pennsylvania. We have covered this ground above under the heading (I (a)) "WAS THE NEVADA DECREE SUBJECT TO COLLATERAL ATTACK?"

At the argument in the Superior Court of Pennsylvania, the Petitioner openly took the position that he had a right to go to Nevada, stay there just long enough to get his Decree and to leave at once thereafter, in spite of his testimony in Nevada (R. 22), that he intended to remain in Nevada, Clark County, as his "permanent place of residence" (R. 22; R. 43).

Petitioner, in the Courts below, and at present, has never been specific, and has never defined the alleged new rule of law supposed, according to him, to have been established by the Decision in Williams v. N. C., but has implied, without undertaking to so state, that the Decision in Williams v. N. C., in overruling Haddock v. Haddock, (201 U. S. 562), has laid down a new rule of law *prohibiting* an inquiry by the Court of the matrimonial domicile, into the jurisdiction of the foreign Court (Nevada), which renders a decree in divorce. This was and is Petitioner's position; (Petitioner's Brief, p. 26).

Examination of the Opinion in Williams v. N. C. discloses absolutely no basis for assuming that any new rule of law was announced prohibiting inquiry into the jurisdiction of the foreign Court.

We contend that this Court did not take under consideration, nor did it decide, the issue of domicile in Nevada—nor was said issue even before this Court in said Williams Case; nor did this Court fix any rule whatever prohibiting inquiry into the bona fides of ANY libellant's domicile. Findings of "domicile" appearing on the face of the record of a foreign Court (Nevada), remain in exactly the same status as BEFORE the Williams v. N. C. decision, i.e., such findings are still open.

> "A bona fide domicile being a jurisdictional fact, its existence is subject to challenge before the Courts of other States, notwithstanding a finding of 'residence' or 'domicile' upon the divorce record". (Prof. Lorenzon; Vol. 52 Yale Law Journal, p. 353).
>
> Bell v. Bell; 181 U. S. 175; 21 S. Ct. 551 (1901);
>
> Andrews v. Andrews, 188 U. S. 14; 23 S. Ct. 237 (1902);
>
> Thompson v. Whitman, 18 Wallace, 457 (1873);
>
> Bowditch v. Bowditch, 314 Mass. 410; 50 N. E. 2d 65;
>
> Noffsinger v. Noffsinger, 50 Fed. Supp. 810, 814;
>
> Fyock's Estate, 135 Pa. 522;
>
> Hein's Estate, 22 Pa. Super. Ct. 31;
>
> Commonwealth v. Yarnell, 313 Pa. 244, 251.
>
> "There is no doubt of the power of the courts below to inquire into the jurisdictional facts necessary to confer jurisdiction on the Nevada Court"; (R. 60)
>
> (Opinion Supreme Court of Pennsylvania; LINN, J), 349 Pa. 451; 35 At. 2d 335;
>
> 48 Dickinson Law Review, 112, Vol. X, No. 4, April, 1944, discussion and list of cases therein cited, including Esenwein, case at bar.

The *fact of bona fide domicile* WAS ADMITTED BY THE STATE OF NORTH CAROLINA, and *it was not found either as a fact or as a matter of law* by this Court in the Williams Case.

In the Williams Case, his Honor Mr. Justice DOUGLAS who delivered the Opinion of this Court, said:—

> "Nor do we reach here the question as to the power of North Carolina to refuse full faith and credit to Nevada divorce decrees because, contrary to the findings of the Nevada court, North Carolina finds that no bona fide domicile was acquired in Nevada."

North Carolina did *not* find that no bona fide domicile was acquired; on the contrary, North Carolina *admitted* actual, i.e., bona fide domicile in Nevada of the defendants in said Williams Case.

Therefore, the question of bona fide domicile of libellants in the Williams Case did not arise, and was not considered nor decided in Mr. Justice Douglas's Opinion of the Majority of this Court.

Mr. Justice Douglas in the Opinion also said:

> "In the first place *North Carolina does not seek* to sustain the judgment below on that ground" (i.e., lack of Nevada domicile). "Moreover *it admits that there is probably enough evidence in the record that petitioner be considered 'to have been actually domiciled in Nevada'*". (Italics ours)
>
> Williams v. N. C. Vol. 317 U. S. p. 291.

> "According to the majority opinion written by Mr. Justice DOUGLAS, *the issue of domicile was not before the Court.* The only question, therefore, was whether a divorce granted in Nevada upon constructive service to a persons *admittedly domiciled* in the state could be denied recognition by North Carolina." (Italics ours)
>
> (Prof. Lorenzon: 52 Yale Law Journal, p. 344; March 1943.)

Williams v. N. C. granted no immunity against the firmly established legal right to challenge the jurisdiction of the foreign (Nevada) Court. There still remains the freedom to inquire into the jurisdiction of the foreign court, as before the Williams Case.

Where the husband was NOT a bona fide resident of Pennsylvania, "a decree of divorce obtained in the state of Pennsylvania *in which neither party is domiciled*, upon service by publication and in *another* state, is entitled to no faith and credit in *that* State:" (Bell v. Bell, 181 U. S. 175; 21 S. Ct. 551 (1901).

> "He (Mr. Justice DOUGLAS) painstakingly pointed out that the Court was NOT OVERRULING Bell v. Bell": (R. 53). (Judge KENWORTHEY, Opinion, Superior Court of Pennsylvania).

The Williams Case decided:—(1) As to the domicile of the defendants in that case in Nevada, not considered and therefore not decided because ADMITTED by North Carolina; (2) As to the jurisdiction of the Nevada Court over the persons of the respondent spouses in North Carolina, it was held that, as to the matter of substituted service (overruling Haddock v. Haddock), that the service on the respondent spouses was valid.

But it must not be forgotten that this Nevada mode of substituted service upon the respondents in North Carolina, *depended in the first place for its breath of life* upon the actual and bona fide *domicile* of the libellants *in Nevada*, and that this all-important element was ADMITTED by the State of North Carolina; and that by virtue of this admission, the Nevada Court was considered to have acquired jurisdiction, *and not otherwise*. Without jurisdiction to begin with, we would never arrive at any question of service, we would not get that far.

In the case at bar the Petitioner left Nevada immediately after obtaining his divorce (R. 55); he is living in Cleveland, Ohio only a few weeks after he swore he intended

to remain a permanent resident of Nevada (R. 6. Par. Seventh; R. 22; R. 43). He had no intention of establishing a bona fide domicile in Nevada. The Nevada Court therefore had no jurisdiction,—the animus manendi was lacking. Therefore *whether or not* Haddock v. Haddock was *overruled* is *entirely immaterial to the Petitioner in this case.*

Conclusion: What did the Williams Case decide? We quote from the Opinion of the Superior Court of Pennsylvania, by Judge KENWORTHEY (R. 52):—

> "It held that IF plaintiff in a divorce proceeding acquires a bona fide domicil in the state which grants him a divorce, the decree is entitled to full faith and credit. This did not in the least impair the authority of the earlier decision in Bell v. Bell, that domicil, not merely the residence, of one of the parties (there the plaintiff), must be established to support a binding decree where there is substituted service." (Italics and emphasis ours)

Jurisdiction is always open to collateral attack and may be based solely upon the face of the proceedings of the foreign court, *without resorting to extrinsic proof*, i.e., from an inspection of the record itself; (R. 42-43; R. 6, Par. Seventh; R. 22; R. 55).

O'Donoghue v. Boies, 159 N. Y. p. 99; 63 N. E. 537.

VII. NO SUBSTANTIAL FEDERAL QUESTION IS INVOLVED.

Conclusion: The claim of Petitioner as set forth in his Brief for Petitioner (p. 36), that, "A Substantial Federal Question is Involved", evades completely the primary, fundamental question in limine, of bona fide domicile, and of real intention to establish such a domicile in Nevada. That is the real question in this case: it is a question of

fact, and the facts are admitted; (R. 55, Opinion; R. 6, Par. 7th; R. 22; R. 42).

No Federal question is involved.

Respectfully submitted,

J. THOMAS HOFFMAN,
JACOB SELIGSOHN,
N. J. LIPPARD.

SUPREME COURT OF THE UNITED STATES.

No. 20.—October Term, 1944.

William F. Esenwein, Petitioner, *vs.* Commonwealth *ex rel.* May H. Esenwein. } On Writ of Certiorari to the Supreme Court of the State of Pennsylvania.

[May 21, 1945.]

Mr. Justice Frankfurter delivered the opinion of the Court.

This case involves the same problem as that which was considered in *Williams* v. *North Carolina*, No. 84, decided today. There are minor variations of fact, but the considerations which controlled the result in the *Williams* case govern this.

Petitioner and respondent were married in Pennsylvania in 1899. They separated in 1919 but continued to live there. The wife, respondent, obtained a support order in the Pennsylvania courts which was modified from time to time. Twice the petitioner sought a divorce in Pennsylvania and failed. In 1941 he went to Nevada, arriving at Las Vegas on June 23rd. Six weeks later, promptly within the minimum period allowed by Nevada law, he there filed a suit for divorce. It was granted September 8th. Shortly thereafter, early in October, he left Nevada and took up his residence in Cleveland, Ohio, where he made his home. On February 1, 1943 petitioner filed an application before the County Court for Allegheny County, Pennsylvania, for total relief from the support order. [illegible]id so on the basis of the decision in *Williams* v. *North Carolina*, 317 U. S. 287, which had been decided on December 21, 1942. Exemplified copies of the Nevada proceedings, with other relevant evidence, were submitted to the County Court, which, after argument, denied the application. Its decision was affirmed by the Superior Court on the ground that petitioner did not have a *bona fide* domicil in Nevada when he obtained his decree of divorce. 153 Pa. Super. 69, 33 A. 2d 675. This was sustained by the Supreme Court of Pennsylvania, 348 Pa. 455, 35 A. 2d 335, and we then granted certiorari. 322 U. S. 725.

Since, according to Pennsylvania law, a support order does not survive divorce, *Commonwealth* v. *Parker*, 59 Pa. Super. 74;

Commonwealth v. *Kurniker*, 96 Pa. Super. 553, the efficacy of the Nevada divorce in Pennsylvania is the decisive question in the case. The facts relating to domicil are not essentially different from those set forth in *Williams* v. *North Carolina*, No. —, *ante*, except that petitioner, instead of staying in an auto court, lived in a hotel and did not return to Pennsylvania, his domiciliary state before he came to Nevada, but went to Ohio.

The Full Faith and Credit Clause placed the Pennsylvania courts under duty to accord *prima facie* validity to the Nevada decree. The burden is on the litigant who would escape the operation of a judgment decreed in another State. Pennsylvania recognized that burden, but its courts were warranted in finding that the respondent sustained her burden of impeaching the foundation of the Nevada decree on the jurisdictional prerequisite of *bona fide* domicil. The Pennsylvania Supreme Court rightly indicated that if merely the Nevada decree had been in evidence, it was entitled to carry the day. But the Supreme Court found that on the entire showing there was convincing countervailing evidence to disprove petitioner's intention to establish a domicil in Nevada. The Pennsylvania courts have viewed their Constitutional duty correctly. It is not for us to retry the facts, and we cannot say that in reaching their conclusion the Pennsylvania courts did not have warrant in evidence and did not fairly weigh the facts.

Petitioner makes a subsidiary claim which need not detain us long. He asserts that he had no notice that the Nevada domicil was to be put in issue, and that therefore it was unfair to decide that question on this record. He points to the fact that for its decision the County Court relied on the Pennsylvania denials of divorce as *res judicata*, whereas the appellate courts rested their decisions on the issue of domicil. Since the record does not support the basis of this claim, we are relieved from considering its legal significance. The issue of domicil was appropriately pleaded in defense, it was contested at the trial, and before the Superior Court petitioner filed a supplemental brief on that issue. A claim of deprivation of opportunity to be heard on the question of domicil before the Pennsylvania courts is without merit.

Affirmed.

Mr. Justice DOUGLAS, concurring.

I think it is important to keep in mind a basic difference between the problem of marital capacity and the problem of support.

We held in *Williams* v. *North Carolina*, 317 U. S. 287, that a Nevada divorce decree granted to a spouse domiciled there was entitled to full faith and credit in North Carolina. That case involved the question of marital capacity. The spouse who obtained the Nevada decree was being prosecuted in North Carolina for living with the one woman whom Nevada recognized as his lawful wife. Quite different considerations would have been presented if North Carolina had merely sought to compel the husband to support his deserted wife and children, whether the Nevada decree had made no provision for the support of the former wife and children or had provided an amount deemed insufficient by North Carolina. In other words, it is not apparent that the spouse who obtained the decree can defeat an action for maintenance or support in another State by showing that he was domiciled in the State which awarded him the divorce decree. It is one thing if the spouse from whom the decree of divorce is obtained appears or is personally served. See *Yarborough* v. *Yarborough*, 290 U. S. 202; *Davis* v. *Davis*, 305 U. S. 32. But I am not convinced that in absence of an appearance or personal service the decree need be given full faith and credit when it comes to maintenance or support of the other spouse or the children. See *Pennoyer* v. *Neff*, 95 U. S. 714. The problem under the full faith and credit clause is to accommodate as fully as possible the conflicting interests of the two States. See *Magnolia Petroleum Co.* v. *Hunt*, 320 U. S. 430, 447 (dissenting opinion). The question of marital capacity will often raise an irreconcilable conflict between the policies of the two States. See *Williams* v. *North Carolina, supra.* One must give way in the larger interest of the federal union. But the same conflict is not necessarily present when it comes to maintenance or support. The State where the deserted wife is domiciled has a deep concern in the welfare of the family deserted by the head of the household. If he is required to support his former wife he is not made a bigamist and the offspring of his second marriage are not bastardized. In that view Pennsylvania in this case might refuse to alter its former order of support or might enlarge it, even though Nevada in which the other spouse was domiciled and obtained his divorce made a different provision

for support or none at all. See Radin, The Authenticated Full Faith and Credit Clause, 39 Ill. L. Rev. 1, 28.

Mr. Justice BLACK joins in this opinion.

Mr. Justice RUTLEDGE, concurring.

In accordance with the views which I have expressed in *Williams* v. *North Carolina*, No. 84, decided this day, I do not think full faith and credit have been given by the Pennsylvania courts to the Nevada decree in this case. But upon the basis of the Court's decision in that case, made applicable also in this one, I concur in the result. In doing so, however, it is appropriate to indicate my agreement with the views expressed in the concurring opinion of Mr. Justice Douglas that the jurisdictional foundation for a decree in one state capable of foreclosing an action for maintenance or support in another may be different from that required to alter marital status with extraterritorial effect.